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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of

Commission Inquiry on  
Competitive Bidding Process for  
Report to Congress

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WT Docket No. 97-150

To: The Commission

**COMMENTS OF**  
**THE RURAL TELECOMMUNICATIONS GROUP**

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## SUMMARY

Section 309(j)(12) of the Communications Act of 1934, as amended, (“the Act”) requires the Commission to report to Congress on the relative success or failure of the use of competitive bidding to award licenses for telecommunications services. While the Commission’s competitive bidding procedures have resulted in the raising of a substantial sum of money, unfortunately, they have not adequately ensured the deployment of new services to rural Americans and have not provided adequate opportunities for rural telephone companies to participate in the provision of these new and innovative spectrum-based services as required by Section 309(j) of the Act.

The Commission’s reliance on geographic partitioning to ensure the deployment of service to rural America is misplaced. In practice, licensees are unwilling to partition small areas and are unwilling to partition to rural telephone companies. The Commission’s liberal performance requirements also fail to secure deployment to rural areas. Licensees can meet the Commission’s current buildout requirements by providing service to the densely populated areas within the license area. To ensure that licensees deploy service to rural America, the Commission should adopt unserved area licensing procedures, similar to those for the cellular service, for all spectrum-based services. The Commission should also license services on the basis of small geographic service areas such as Metropolitan Statistical Areas (“MSAs”) or Rural Service Areas (“RSAs”). The Commission should report that the competitive bidding procedures have failed to secure the rapid deployment of service to rural America, and advise Congress that the Commission will take the necessary steps to remedy the situation.

The competitive bidding procedures have also failed to secure the successful participation of rural telephone companies in spectrum-based services. Rural telephone companies failed to

secure licenses through the actual auction process. In addition, rural telephone companies have been unable to acquire licenses through partitioning because licensees are not interested in partitioning. The Commission's ownership policies and eligibility restrictions have generally limited opportunities for rural telephone companies more than they have helped. The Commission's payment provisions have been of benefit to those rural telephone companies that happen to qualify as the "small business" *du jour*. In order to provide meaningful opportunities for rural telephone companies to participate in the provision of spectrum-based services, the Commission should adopt designated entity benefits tailored to the needs of rural telephone companies. Most importantly, the Commission should adopt unserved area licensing that ensures that a licensee can not hold rural areas hostage.

**Before the  
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<b>Competitive Bidding Process for</b>	)	
<b>Report to Congress</b>	)	

**To: The Commission**

**COMMENTS OF  
THE RURAL TELECOMMUNICATIONS GROUP**

The Rural Telecommunications Group ("RTG"), by its attorneys, respectfully submits these comments in response to the Public Notice, FCC 97-232 ("*Notice*") issued by the Federal Communications Commission ("FCC" or "Commission") on July 2, 1997, in WT Docket No. 97-150 seeking information to assist the Commission in preparing a report to Congress, as required by Section 309(j) of the Communications Act of 1934, as amended ("the Act"), on the use of competitive bidding to award telecommunications licenses. RTG specifically addresses its comments to the Commission's competitive bidding process as it affects the delivery of spectrum-based services to rural America and the participation of rural telephone companies in the provision of these new services.

**STATEMENT OF INTEREST**

RTG is a group of over sixty concerned rural telecommunications companies who have joined together to promote the efforts of its member companies to speed the delivery of new, efficient and innovative telecommunications technologies to the populations of remote and

underserved sections of the country. RTG's members have participated in or considered participating in numerous spectrum auctions including: broadband Personal Communications Services ("broadband PCS"); Multipoint Distribution Service ("MDS"), 900 MHz Specialized Mobile Radio ("SMR") and unserved areas in the cellular telephone service ("unserved cellular"). RTG's members also intend to participate or attempt to participate<sup>1</sup> in upcoming auctions for Local Multipoint Distribution Service ("LMDS"); narrowband PCS; paging; 800 MHz SMR, 220 MHz services, and Multiple Address Systems ("MAS"). In addition, RTG has participated extensively in Commission rulemaking proceedings to implement the competitive bidding process and to determine licensing and operational rules for spectrum-based services.<sup>2</sup> Accordingly, RTG is well qualified to comment in this proceeding.

## COMMENTS

As RTG will explain more fully below, the Commission's competitive bidding procedures generally have earned a substantial return for the U.S. Treasury and increased the efficiency of awarding new Commission licenses, and for this RTG commends the Commission. While the competitive bidding procedures have resulted in the raising of a substantial sum of money, unfortunately, they have not adequately ensured the deployment of new services to rural Americans and have not provided adequate opportunities for rural telephone companies to

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<sup>1</sup> As discussed below, contrary to the directive of Section 309(j), the Commission's in-region eligibility restrictions currently prohibit many of RTG's members from participating in the auction for Local Multipoint Distribution Service ("LMDS") licenses. *See* 47 C.F.R. § 101.1003.

<sup>2</sup> A partial list of RTG's comments and reply comments is attached as Attachment A. These documents should be incorporated into the record of WT Docket No. 97-150.

participate in the provision of these new and innovative spectrum-based services as required by Section 309(j) of the Act.

**I. COMPETITIVE BIDDING PRACTICES HAVE FAILED TO SECURE PROMPT DELIVERY OF SERVICE TO RURAL AREAS OR TO ADDRESS THE NEEDS OF RURAL SPECTRUM USERS**

To date, the Commission has adopted no competitive bidding rules that secure the prompt delivery of service to rural America as Section 309(j) of the Act requires. At best the Commission has abdicated responsibility for rural areas, relying instead on an uncertain aftermarket for spectrum licenses to ensure service to rural users. At worst, the Commission has allowed licensees to leave rural spectrum fallow and has provided no incentive to licensees to provide service to rural America. Specifically, the Commission's exclusive reliance on geographic partitioning coupled with the lack of meaningful performance requirements and the use of large geographic service areas fail to ensure delivery of service to rural areas.

**A. Geographic Partitioning Alone Does Not Ensure Delivery of Service to Rural Areas.**

In a string of rulemaking proceedings implementing Section 309(j), the Commission has preferred the use of large license areas, adopted ever more illusory performance requirements, and come to rely on geographic partitioning as the primary "measure" for ensuring delivery of service to rural areas.<sup>3</sup> Regrettably, in the absence of meaningful buildout requirements,

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<sup>3</sup> See, e.g., *In re* Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, CC Docket No. 92-297, FCC 97-82 at ¶ 362 (rel. March 13, 1997) ("*LMDS Second R&O*") (if it is profitable to provide service to rural areas, then licensees will provide service themselves or through partitioning); *In re* Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), *Report and Order*, GN Docket No. 96-

(continued...)

discussed *infra*, partitioning is not an effective means of distributing licenses to companies that will provide service to rural areas.<sup>4</sup>

### 1. Licensees Are Unwilling to Partition

RTG has previously and repeatedly warned the Commission that many licensees are unwilling to partition smaller geographic areas because (1) licensees find it more burdensome than profitable to negotiate and administer partitioning deals, and/or (2) licensees ultimately intend to sell their systems to larger operators and do not want to carve up their license areas.<sup>5</sup>

RTG's members have found licensees in services such as broadband PCS and MDS generally

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<sup>3</sup>(...continued)

228, FCC 97-50 at ¶ 200 (rel. February 19, 1997) ("*WCS R&O*") (licensing in 6 Regional Economic Area Groupings and 52 Major Economic Areas); *In re* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Narrowband PCS, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, PP Docket No. 93-253, 10 FCC Rcd 175 (1994) ("*Competitive Bidding Third MO&O*") (provisions for rural telephone companies unnecessary); *In re* Amendment of Parts 21 and 74 of the Commission's Rules with regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Fixed Service and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, MM Docket No. 94-131, PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589 (1995) ("*MDS R&O*") (no special provisions for rural telephone companies). Even the *Notice* discusses partitioning and disaggregation as the only measures that the Commission adopted to ensure service to rural areas. *Notice* at 7.

<sup>4</sup> As the Commission recognized in the *Notice*, the issues of license area size, performance requirements and partitioning rules all affect the delivery of service to rural areas and should be considered as interdependent issues.

<sup>5</sup> See, RTG's Comments and Reply Comments in response to Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees; Implementation of Section 257 of the Communications Act--Elimination of Market Entry Barriers, *Notice of Proposed Rulemaking*, WT Docket 96-148, GN Docket No. 96-113 ("*PCS Partitioning NPRM*"); see also RTG Comments (filed June 18, 1997), *in re* Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS; Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Narrowband PCS, GEN Docket No. 90-314, ET Docket No. 92-100, PP Docket No. 93-253, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 97-140 (rel. April 23, 1997) ("*Narrowband PCS R&O and FNPRM*").

uninterested in negotiating or consummating partitioning deals. In fact, more than a dozen major wireless companies have reported to RTG members a lack of interest in partitioning arrangements.<sup>6</sup> Under the Commission's current competitive bidding rules, there is simply no incentive for licensees to partition to companies that will provide service to relatively higher cost rural areas.

The lack of partitioning agreements demonstrates the inefficacy of partitioning as the primary means of ensuring the delivery of new services to rural America. To date, parties have consummated only six partitioning deals in auction-licensed services. Five of the deals involve only one service, broadband PCS, and the other involved a 900 MHz SMR partitioning arrangement.<sup>7</sup> The relative failure of partitioning in auction-licensed services must be compared to the hundreds of partitioning deals consummated in the cellular service where licensees had only five years to construct their systems without facing competition to provide service to

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<sup>6</sup> See *Subdividing Licenses Holds Promise for Small Carriers But Some Large Companies Aren't Looking to Do Small Deals*, Land Mobile Radio News, Vol. 51, No. 18 (May 2, 1997) (reporting that GTE has decided not to enter into additional partitioning deals with rural telephone companies because, "[i]t costs just as much to negotiate a small contract as a large one...making them less attractive.").

<sup>7</sup> The auction-related partitioning deals all involved broadband PCS Major Trading Areas ("MTAs"). No partitioning arrangements have been consummated in Basic Trading Area ("BTA")-licensed areas. See Pub. Notice, Report No. LB-97-11 (rel. Dec. 20, 1996) (File No. 50050-CW-AL-97) (Cincinnati-Dayton MTA, *granted* Public Notice, Report No. LB-97-23 (rel. March 7, 1997); Pub. Notice, Report No. LB-97-04 (rel. Nov. 1, 1996) (File No. 50003-CW-AL-96) (Spokane-Billings MTA); Pub. Notice, Report No. LB-96-45 (rel. Sept. 6, 1996) (File No. 50030-CW-AL-96) (Minneapolis-St. Paul MTA); Pub. Notice, Report No. LB-96-38 (rel. July 19, 1996) (File No. 50001-CW-AL-96) (Richmond-Norfolk MTA); Pub. Notice, Report No. LB-96-27 (rel. May 10, 1996) (File No. 50002-CW-AL-96) (Spokane-Billings MTA); *in re* Lancaster Communications, Inc., *Order*, DA 97-1470 (rel. July 11, 1997) (File No. S000434) (900 MHz SMR).

unserved areas.<sup>8</sup> Accordingly, by any reasonable assessment, partitioning in auction-licensed services has been of very limited benefit in ensuring that licensees promptly deliver service to rural America.

In the *Notice*, the Commission cites to one partitioning deal as a demonstration of the benefits of the partitioning rules.<sup>9</sup> The Commission asserts that the deal increased the partitionee's footprint and gave it "access to several key interstate arteries."<sup>10</sup> The Commission's reliance on this deal as support for its proposition that rural America is benefitted by partitioning is somewhat disingenuous. The partitioned area contains three of the major population centers in West Virginia: Beckley (population 17,800), Huntington (54,200) and Charleston (56,800), the capital of West Virginia. Overall, the population of the area partitioned, according to the amendment filed by the parties to the deal in February, 1997 is over 1.5 million people. This can hardly be considered the kind of service to rural areas Congress intended. Accordingly, the Commission's example is a very poor example of how partitioning benefits rural America.

## **2. Partitioning Does Not Meet the Obligation of Section 309(j)**

The Commission's partitioning policy is really nothing but a policy of allowing the aftermarket for licenses to determine what areas receive service. By itself, partitioning fails to meet the statutory requirement of Section 309(j) that the Commission *promote* the rapid deployment of telecommunication services to rural Americans.<sup>11</sup> Section 309(j)(4)(B) specifically requires the Commission to:

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<sup>8</sup> See 47 C.F.R. § 22.947 (five year exclusive buildout period).

<sup>9</sup> *Notice* at 7.

<sup>10</sup> *Id.*

<sup>11</sup> See 47 U.S.C. § 309(j)(3)(A).

include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure *prompt delivery of service to rural areas*.....<sup>12</sup>

A rule merely allowing licensees to sell parts of their license areas in an auction aftermarket does not rise to the level of an affirmative performance requirement that ensures the prompt delivery of service. In the mandate of Section 309(j)(4)(B), Congress recognized that market forces alone might not guarantee the provision of service to certain areas or certain classes of Americans. Section 309(j) of the Act does not require the Commission to allow licensees to serve rural areas “if they so choose.” Rather, Section 309(j) of the Act requires the Commission to ensure that licensees *rapidly deliver service to rural areas*.<sup>13</sup> In its report to Congress, the Commission should acknowledge that it has not yet succeeded in this respect, but that it will adopt new procedures to remedy the deficiency.

**B. The Current “Liberal” Performance Requirements Fail to Secure the Prompt Delivery of Service to Rural Areas**

Despite the mandate of Section 309(j), the Commission has substantially retreated from imposing meaningful construction requirements on licensees that acquire their licenses through the auction process. Initially, the Commission moved from geographic-based coverage requirements to population-based requirements.<sup>14</sup> Most recently, the Commission adopted

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<sup>12</sup> 47 U.S.C § 309(j)(4)(B) (emphasis added).

<sup>13</sup> The language of the *Notice* suggests even the Commission’s recognition of the failure of partitioning to satisfy the statutory obligation of Section 309(j). The *Notice* seeks comment on what effect partitioning policies have had on “improving opportunities for delivery” of service to rural areas. *Notice* at 8. But Section 309(j) requires the Commission to “ensure the prompt delivery of service” not just to “improve opportunities for delivery.”

<sup>14</sup> Compare 47 C.F.R. § 22.903(a) (1987) (requiring coverage of 75% of the land or population of a Cellular Geographic Service Area (“CGSA”) with 47 C.F.R. § 24.203 (requiring licensees of 30 megahertz broadband PCS blocks to provide coverage to one third of the population of the license area within five years and two-thirds of the population within ten years (continued...))

“substantial service” as the performance requirement for Wireless Communications Service (“WCS”) and LMDS and proposed this standard for narrowband PCS and paging.<sup>15</sup> Under the substantial service criteria, a licensee need only provide service to 20% of the population within a given number of years or a licensee may make some other showing of “substantial service.”<sup>16</sup>

Unfortunately, the Commission’s adoption of lax buildout requirements does not satisfy Section 309(j), and as the Commission itself has recognized, its performance requirements for auction-awarded, spectrum-based services have failed to ensure prompt delivery of service to rural America.<sup>17</sup> Licensees of spectrum-based services can easily meet their performance obligations by providing service to densely populated areas and their immediate environs, areas to which they would provide service anyway.<sup>18</sup>

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<sup>14</sup>(...continued)

and requiring licensees of 10 megahertz broadband PCS blocks to provide coverage to 25% of the population within five years).

<sup>15</sup> See *WCS R&O* at ¶ 110-111; *LMDS Second R&O* at ¶ 266; *Narrowband PCS R&O and FNPRM* at ¶ 41-46. As RTG previously advised the Commission, because of the unique circumstances surrounding the licensing of WCS, the extremely lax “substantial service” standard adopted for that service should not be extended to other services. See Petition for Reconsideration filed by RTG in Docket 92-297 at 13-14 (filed May 29, 1997).

<sup>16</sup> See, e.g., *LMDS Second R&O* at ¶ 270.

<sup>17</sup> See *Narrowband PCS R&O and FNPRM* at ¶ 46 (Commission’s construction requirements may cause licensees in all services to build first in urban areas and “actually slow the development of service to rural areas.”).

<sup>18</sup> Mysteriously, the Commission has adopted buildout requirements which, in effect, require licensees to construct in dense areas, while the Commission has adopted a marketplace approach to rural areas. See *Narrowband PCS R&O and FNPRM* at ¶ 46. *LMDS Second R&O* at ¶ 179-180 (“[I]f it is profitable to provide [LMDS] service to rural areas, a licensee should be willing to do so, either directly or by partitioning the license and allowing another firm to provide service.”) Pursuant to 309(j) it would make more sense to allow the marketplace to ensure service to lucrative urban and dense areas while imposing regulatory incentives to provide service to rural areas.

Perhaps even more alarmingly, beyond the applicable five or ten year benchmarks, there are no performance requirements for licensees, nor is there a means of recovering unused spectrum. The Commission has abandoned the unserved area policy that was so successful in the cellular service. Under the Commission's rules for auction-licensed services, once a licensee meets the Commission's very minimal requirements, the licensee need do no more, and will face no competition for the use of its spectrum.

The Commission's buildout requirements for spectrum-based services are, in effect, silent as to rural areas. Those requirements do not purport to encourage service in rural areas, and were never intended to address rural concerns. Their failure to ensure rapid deployment should come as no surprise.

The Commission's apparent hostility to performance requirements stems from its blind reliance on market forces as a means of ensuring the provision of service to all telecommunication users. The Chief of the Wireless Telecommunications Bureau ("WTB") even went so far as to state that paying for spectrum at auction gives a licensee the "freedom not to use the spectrum at any particular time...."<sup>19</sup> This economic theory is, however, inconsistent with the rural service obligations of Section 309(j).

The current performance requirements for auction-awarded, spectrum-based services place no impetus on licensees to either provide service to rural areas or to partition to companies that would provide service to rural areas. What is missing are the meaningful performance requirements which Section 309(j) of the Act requires. Accordingly, the Commission should

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<sup>19</sup> Remarks of M. Farquhar, Chief, Wireless Telecommunications Bureau (November 20, 1996).

reconsider its lax performance requirements for those services which it has already auctioned and adopt stricter, more meaningful performance requirements.<sup>20</sup>

Specifically, the Commission should adopt “unserved area” rules for all spectrum-based services similar to those adopted for the cellular radio service.<sup>21</sup> The cellular unserved area rules were extremely effective at ensuring the development of a nationwide cellular network. Such “use it or lose it” provisions encourage licensees either to provide service themselves, or to partition licenses to smaller companies who desire to serve less populated areas. Most importantly, they prevent licensees from not using or underutilizing precious spectrum.

Meaningful performance requirements will encourage licensees to partition to companies willing to provide service to rural areas, and accordingly, the combination of partitioning and performance requirements *will* ensure the rapid deployment of new services to rural areas. Unserved area licensing will also facilitate the entry of new companies by encouraging licensees to seek entrepreneurial companies who can develop innovative niche services for high cost or marginal areas that a licensee might not otherwise serve.

### **C. The Use of Large Service Areas and Large Spectrum Blocks Inhibits Delivery of Service to Rural Areas**

The Commission has increasingly sought to license services based on larger geographic areas.<sup>22</sup> This policy has adversely impacted the deployment of service to rural Americans. The

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<sup>20</sup> The Commission has wisely reserved the right to reevaluate the effectiveness of its performance requirements and impose more stringent ones to ensure the delivery of service to rural Americans. *See, e.g., LMDS Second R&O* at ¶ 272.

<sup>21</sup> *See* 47 C.F.R. § 22.949.

<sup>22</sup> *See, e.g., Narrowband PCS R&O and FNPRM* (Narrowband PCS currently licensed nationwide and in five regions; proposing redesignating BTA- and MTA-based areas into addition regional and nationwide licenses); *WCS R&O* (licensing in 6 Regional Economic Area

(continued...)

larger the geographic service area size, the slower and less likely the deployment of the service to rural areas.<sup>23</sup> The tremendous cost of large areas and the huge amount of capital required for deployment tends to attract large companies that will target lucrative large urban areas.

By contrast, use of small areas, such as Metropolitan Statistical Areas (“MSAs”) and Rural Service Area (“RSAs”), facilitates the delivery of service to rural areas by increasing opportunities for rural small businesses and rural telephone companies to acquire licenses. Smaller license areas allow these local businesses to acquire spectrum and tailor service to meet the needs of rural spectrum users. Increasing the number of license areas increases the diversity of licensees, as required by Section 309(j), and this in turn encourages the development of new and innovative technologies and service offerings and the creation of niche services and services targeted to rural areas.

**D. The FCC’s Failure to Ensure Meaningful Opportunities for Rural Telephone Companies To Participate in The Provision of Spectrum-Based Services Has Hindered the Deployment of These Services to Rural America**

In conferring authority on the Commission to award licenses through competitive bidding, Congress specifically directed the Commission to ensure that rural telephone companies had meaningful opportunities to participate in the provision of the services awarded through such process.<sup>24</sup> Congress singled out rural telephone companies as a class of telecommunications providers because Congress recognized the continuing role which rural telephone companies play in ensuring that all Americans, “including those residing in rural areas,” have access to

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<sup>22</sup>(...continued)  
Groupings and 52 Major Economic Areas).

<sup>23</sup> See Comments of RTG in GEN Docket No. 96-228 at 3-7 (filed Dec. 4, 1996).

<sup>24</sup> 47 U.S.C. § 309(j)(3)(B) and 4(D).

telecommunications services at reasonable rates.<sup>25</sup> Congress determined that providing rural telephone companies with an opportunity to participate in the provision of new services is one method of ensuring that at least some licensees will rapidly deploy new services to rural America.

While the Telecommunications Act of 1996 (“1996 Act”) intends to create a pro-competitive de-regulatory national telecommunications policy,<sup>26</sup> Section 254 of the 1996 Act preserves universal service support for certain services and providers and directs the Commission to insure that consumers residing in rural areas have access to “advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas.”<sup>27</sup> The spectrum-based services covered by Section 309(j) are contemplated for inclusion as supportable services.<sup>28</sup> In enacting the 1996 Act, Congress was fully aware that in remote rural areas the incumbent rural telephone company would remain the only “eligible telecommunications carrier” eligible to receive universal service support pursuant to Section 214(e) of the Act.<sup>29</sup> By failing to provide rural telephone companies the opportunity to provide advanced spectrum-based services (*See* Section II, *infra*), the Commission’s competitive

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<sup>25</sup> *See* 47 U.S.C. § 309(j)(3)(A).

<sup>26</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>27</sup> 47 U.S.C. § 245(b)(3).

<sup>28</sup> *See, e.g., LMDS Second R&O* at ¶ 271 and note 403 (universal service policies will promote deployment of LMDS to rural areas). Services such as LMDS may also provide a less expensive method of providing traditional two-way switched telephone service to remote high cost rural areas and therefore be used to provide the services already included in the universal service definition. The definition of universal service is continually “evolving” pursuant to Section 254(c) of the Act.

<sup>29</sup> 47 U.S.C. § 214(e).

bidding rules effectively limit universal service support for those spectrum-based services and, accordingly, reduce the likelihood that rural Americans will have access to such services.

In both Section 309(j) and Section 254(b)(3) Congress recognized the need to ensure parity between urban and rural areas. Congress also recognized that rural telephone companies have historically provided telecommunications services to rural areas that other entities, large and small, were unwilling to serve. Rural telephone companies are intimately linked to their communities and have a serious stake in the technological advancement of their communities.

Unfortunately, the Commission has not yet recognized that providing rural telephone companies with opportunities to provide spectrum-based services is one important method of ensuring the prompt delivery of service to rural areas. As RTG will explain below, the Commission's competitive bidding rules have not ensured meaningful opportunities for rural telephone companies as evidenced by their lack of success in the competitive bidding process. Not only does this lack of opportunity to participate in the competitive bidding process contravene Section 309(j)'s mandate that the Commission ensure that rural telephone companies are given the opportunity to participate in the provision of spectrum-based services, this lack of successful rural telephone company participation has also contributed to the failure of the competitive bidding process to deploy telecommunications services to rural America.

## **II. THE COMPETITIVE BIDDING RULES HAVE FAILED TO ENSURE SUCCESSFUL RURAL TELEPHONE COMPANY PARTICIPATION IN THE COMPETITIVE BIDDING PROCESS**

In one spectrum-based service after another the Commission has refused to adopt specific provisions to provide rural telephone companies a meaningful opportunity to participate in the auction for such services, relying instead on partitioning or on "small business" benefits to ensure

rural telephone company participation.<sup>30</sup> These policies have not however met the goals of Section 309(j) as evidenced by rural telephone companies' lack of success in the auctions. Pursuant to Section 309(j)(12)(D) of the Act, the Commission should report this lack of success to Congress.

**A. Rural Telephone Companies Have Not Been Successful In Their Attempts to Acquire Licenses Through Competitive Bidding**

There are more than 800 rural telephone companies in the nation providing telephone service. Only a tiny fraction of these companies have successfully acquired licenses through the auction process. No rural telephone companies participated in the auctions for Digital Audio Radio Service ("DARS") or Direct Broadcast Satellite ("DBS"). RTG is not aware of any rural telephone companies that won licenses for 900 MHz SMR or Interactive Video and Data Service ("IVDS"). RTG is aware of very few rural telephone companies that won licenses for narrowband PCS or A and B Block broadband PCS, MDS, or WCS. Very few rural telephone companies won C block PCS licenses.<sup>31</sup> Indeed, in rural telephone companies' strongest auction showing -- the D, E, and F block broadband PCS auctions -- only 32 auction winners were affiliated with rural telephone companies.<sup>32</sup> By RTG's estimate, only four percent of the nations' rural telephone companies won interests in D, E, and F Block broadband PCS licenses.

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<sup>30</sup> See, e.g., *Narrowband PCS R&O and FNPRM* (provisions for rural telephone companies unnecessary); *LMDS Second R&O* (special provisions not needed for rural telephone companies); *WCS R&O* (no provisions for rural telephone companies); *Competitive Bidding Third MO&O* (provisions for rural telephone companies unnecessary); *MDS R&O* (no special provisions for rural telephone companies).

<sup>31</sup> Accordingly to Century Personal Access Network, Inc. ("Century"), only three rural telephone companies won C Block licenses. See Comments of Century in WT Docket 96-148, at 9 (filed Aug. 15, 1996).

<sup>32</sup> See, D, E, and F Block Auction Closes, Public Notice, DA 97-81 (Jan. 15, 1997).

In the *Notice*, the Commission states that rural telephone companies have won five percent of the over 4,300 licenses that the Commission has auctioned.<sup>33</sup> The Commission provides no additional information delineating the total number of rural telephone companies that have won these licenses nor describing the services in which the rural telephone companies won licenses. Without further information, the Commission's "five percent" figure is meaningless and misleading. Not all auctioned services are of equal value or importance. Currently, IVDS and WCS are of highly questionable value and utility. In addition, in footnote 18 of the *Notice*, the Commission acknowledges that its figures may reflect double counting of designated entities.

In order to provide detailed and meaningful information to Congress, the Commission should itemize which designated entities won licenses in each service. Specifically, the Commission should detail exactly how many *different* rural telephone companies won licenses for spectrum-based services. How many rural telephone companies won five percent of the licenses? Did one percent of all the rural telephone companies in the nation win licenses? Even assuming for the purposes of argument that four or five percent of the nations rural telephone companies have won a license for a spectrum-based service, such figure can not possibly satisfy the mandate of Section 309(j).

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<sup>33</sup> *Notice* at 9-10. The Commission could not provide exact information to RTG regarding rural telephone company success, but advised RTG that the only way to determine how many rural telephone companies won licenses in the various auctions is to conduct a file-by-file search and review of all auction winners' FCC Forms 175. RTG lacks the substantial resources to conduct such a search and chides the Commission for not making such auction result data available to the public. Such information is certainly available to the Commission since the *Notice* contains a few statistics related to rural telephone company participation and success.

**B. Partitioning Has Not Provided Rural Telephone Companies with Meaningful Opportunities to Participate**

To date, the only designated entity provision specifically tailored to afford rural telephone companies meaningful opportunities to provide spectrum-based services was the *exclusive* right to partition.<sup>34</sup> Under this policy, a rural telephone company had the exclusive right to partition part of a broadband PCS license reasonably related to the rural telephone company's wireline service area.<sup>35</sup> The Commission even cites to this exclusive right in the *Notice* as an action that the Commission took to ensure that rural telephone companies have an opportunity to acquire licenses.<sup>36</sup>

In reliance on the exclusive partitioning rule, many rural telephone companies refrained from participating in the C, D, E, and F Block PCS auctions. Regrettably, after it was too late for rural telephone companies to effectively participate in the broadband PCS auctions, but before rural telephone companies had the opportunity to consummate partitioning deals, the Commission eliminated the exclusive partitioning right and allowed licensees to partition to *any*

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<sup>34</sup> See *In re Implementation of Section 309(j) of the Communications Act — Competitive Bidding, Fifth Report and Order*, 9 FCC Rcd 5532, 5597-99 (1994) ("*Competitive Bidding Fifth R&O*").

<sup>35</sup> *Competitive Bidding Fifth R&O* at ¶ 152-153; 47 C.F.R. § 24.714 (1996).

<sup>36</sup> *Notice* at 7.

entity.<sup>37</sup> Accordingly, the exclusive right to partition was of no benefit to rural telephone companies and the reference to it in the *Notice* is at best disingenuous.

More importantly, as RTG explained above, licensees in general are reluctant to partition their licenses and, accordingly, partitioning has not provided significant opportunities for rural telephone companies to participate in new telecommunications services. Only 12 rural telephone companies have acquired interests in licenses for only two auction-licensed services through partitioning.<sup>38</sup> Based on this record, neither Congress nor the Commission should regard partitioning as a meaningful opportunity for rural telephone companies.

As RTG explained above, the imposition of unserved area licensing would encourage licensees to partition to rural telephone companies and, accordingly, would provide rural telephone companies with opportunities to provide spectrum-based services. In addition, the Commission could allow licensees that partition to rural telephone companies a credit toward their federal Universal Service Fund (“USF”) contribution. This policy would also provide additional opportunities for rural telephone companies and would encourage the deployment of service to rural areas as well.

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<sup>37</sup> See Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees; Implementation of Section 257 of the Communications Act-- Elimination of Market Entry Barriers, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket 96-148, GN Docket No. 96-113 (rel. December 20, 1996) (“*PCS Partitioning R&O*”).

RTG challenged the Commission’s action in the U.S. Court of Appeals for the D.C. Circuit and this case is still pending. *RTG v. FCC*, Case No. 97-1077 (D.C. Cir.) (held in abeyance pending decision on the petition for reconsideration filed by the National Telephone Cooperative Association and the Independent Alliance).

<sup>38</sup> See note 7 *supra*.

**C. Other Designated Entity Provisions Have Had Mixed Success in Ensuring Opportunities for Rural Telephone Companies**

The *Notice* seeks comment on whether specific designated entity provisions have provided significant opportunities for rural telephone companies. Unfortunately, these provisions have had mixed success in providing such opportunities.

**1. Ownership Policies**

The Commission's competitive bidding ownership policies such as the 45 megahertz Commercial Mobile Radio Service ("CMRS") spectrum cap, and the Commission's attribution rules, overall have limited the opportunities for rural telephone companies to participate in new services. For example, many rural telephone companies own interests in cellular licensees and accordingly, pursuant to the Commission's rules, are precluded from acquiring 30 megahertz A, B, and C Block broadband PCS licenses.

**2. Eligibility Restrictions**

The Commission's competitive bidding eligibility restrictions have either been of limited benefit to rural telephone companies in auctions such as the C Block PCS auction or have outright blocked rural telephone company participation in services such as LMDS. The Commission's entrepreneur's block restrictions allowed deep pocketed investors to drive prices well beyond rural telephone companies' ability or business plans<sup>39</sup> and accordingly, were of very limited value.

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<sup>39</sup> The current financial difficulties of the C Block licensees demonstrates the excessive bids placed in that auction. *See* Order, In re Installment Payments for PCS Licensees, DA-97-649 (rel. March 31, 1997); *see also* Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues, Pub. Notice WT Docket 97-82, DA 97-679 (rel. June 2, 1997).

The Commission's LMDS in-region eligibility restriction<sup>40</sup> effectively constitutes an outright prohibition on rural telephone company participation in LMDS in total disregard of the mandate of Section 309(j).<sup>41</sup> As RTG advised the Commission, the LMDS eligibility restriction effectively prevents a rural telephone company from acquiring an LMDS license at auction or from acquiring a license through partitioning.<sup>42</sup>

### **3. Installment Payments**

Favorable payment terms for small businesses have generally been helpful to rural telephone companies that happen to meet the Commission's definition *du jour* of "small business." Where rural telephone companies have qualified for installment payments, the consequent variety of payment options has given such companies additional flexibility to determine how best to participate in a new service. A rural telephone company, however, may or may not qualify as a small business eligible for installment payments in any given service. To satisfy the directives of Section 309(j), the Commission should provide installment payments for all rural telephone companies.

As RTG has previously advised the Commission, the more usurious the Commission's interest rate, the less beneficial installment payments become.<sup>43</sup> Accordingly, the Commission should not charge a rate above the U.S. Treasury note rate. The potential for licensee default

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<sup>40</sup> 47 C.F.R. § 101.1003; *LMDS Second R&O* at ¶¶ 160, 179.

<sup>41</sup> See RTG Petition for Reconsideration, CC Docket No. 92-297 (filed 5/29/97). See also, *NTCA v. FCC*, Case No. 97-1393, consolidated with *James L. Melcher, et. al.*, Case Nos. 93-1110, *et. al.* (D.C. Cir.) (challenging LMDS eligibility restrictions on rural telephone companies).

<sup>42</sup> See RTG Petition for Reconsideration, CC Docket No. 92-297 (filed 5/29/97).

<sup>43</sup> See Comments of RTG in response to the *Narrowband PCS R&O and FNPRM* at 19-20 (filed June 18, 1997).

does not detract from the efficient licensing of spectrum as long as the Commission does not compromise the integrity of the process by treating defaulting winners more favorably than other auction participants. Such favorable treatment would undermine the certainty and integrity of the competitive bidding process. The only “policy” that the Commission need adopt to guard against default is the certainty of loss of license upon default and failure to cure. The Commission may and should revoke and re-auction the license of bidders that default on their payments and fail to cure such defaults. Because the Commission has the power to revoke a license, the Commission need not impose substantial penalties on licensees in financial trouble. Finally, the Commission should transfer post-auction debt servicing to another government agency with expertise in financial matters.

#### **4. Bidding credits**

Bidding credits, for those rural telephone companies that have qualified as small businesses, have been beneficial in providing opportunities to acquire licenses at auction. In order for a bidding credit to be beneficial, it is essential that the Commission set the level of the credit high enough for the given service. Too low a credit is of no value at all. The level of the bidding credit should be based on the type of service, the size of the license area and the potential competitors for the license.<sup>44</sup> As with installment payments, the Commission should adopt appropriate bidding credits for all rural telephone companies for each spectrum-based service.

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<sup>44</sup> See Comments of RTG in response to the *Narrowband PCS R&O and FNPRM* at 17-18 (filed June 18, 1997) (15% not enough where experience in previous auction showed that 40% was required to be of benefit to designated entities).